No. 12563

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MOULTON & POWELL AND J. K. CHEADLE, APPELLEES

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v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY AND ANSWER BRIEF FOR THE UNITED STATES

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I

The Amount Paid by the Government to Satisfy the Judgment in Favor of the District in the Condemnation Proceeding Cannot Be Depleted to Pay the Attorneys Who Opposed the Government in That Proceeding

The amount allowed appellees by the order appealed from—$55,000—was computed by the district court on the premise that through their services in the proceeding to condemn the District's properties a fund of

$422,252.80 had been recovered. As is disclosed by the Government's opening brief, the allowance can be sustained only if in that proceeding the appellees rendered services which benefited those who are entitled to the $422,252.80. Therefore the order is erroneous if all or any part of this sum is ultimately returned to the United States. For—as the Government has made plain—from the inception of the condemnation proceeding appellees opposed the claim of the United States to ownership of the District's assets. In short, the United States has not benefited from the services rendered by appellees.[1]

However, appellees contend (Br. 26-27) that the order is justified because the judgment in the condemnation case declares that the District is "the only person having an interest in and to the $422,252.80 and the District has consented to payment from the fund of the amount stipulated in the contingent-fee contract." The quoted language merely shows that the federal courts have declined to decide between opposing claimants to the District's assets. Obviously it does not indicate that the money will be retained by the District. The District, long since out of business and now in process of liquidation, is at most a mere stakeholder. Indeed, the $422,252.80, or what is left of it, will be kept

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[1] Appellees call attention (Br. 25-26) to the statement of Mr. Ramsey that they were entitled to a reasonable attorney fee and assert "it is too late for the Government to disaffirm that concession now." But the concession was withdrawn in the trial court (see R. 320-322). At the time, as disclosed by the Government's opening brief (pp. 10-11) the court stated that if the Government appealed he would increase the fee from $50,000 to $55,000. Mr. Ramsey then informed the court "that the government objects to the allowance of attorney's fees in this case in the sum of $55,000 or any other sum" (R. 323).

in the court below until in the liquidation proceedings the state courts determine to whom it should be paid. As a result of the determination it will either be returned to the United States or paid to the former landowners or part will be returned to the United States and the balance paid to the former owners. Consequently, appellees in the guise of attorneys for the District may not be paid from funds which should be returned to the United States.

Nor, contrary to appellees' further argument (Br. 28-32) is the order appealed from validated by the December 14, 1950 decision of the Supreme Court of Washington, rehearing denied January 26, 1951. In the first place, as the opinion in that case shows (Appellees' brief at p. 62), the superior court judgment which declared that the United States had "no interest whatever" in the District's assets was modified to declare that the United States "has no *exclusive* interest * * * in the assets of the * * * District and has no basis for seeking distribution to the United States of *all* the net assets of the District * * *." Thus the supreme court has not held that the United States is without any interest in the fund. On the contrary, as appellees recognize (Br. 31) that court did not decide whether in the case of lands conveyed to, rather than condemned by, the United States, the interests in the so-called non-irrigation properties—and hence in this fund—were transferred to the United States.

Unless and until this question is decided adversely to the Government there is no basis for the view that the United States had no interest in the fund and con-

sequently that an allowance of fees based on the whole amount is valid.

Secondly, and in any event, it is the position of the United States that the state court erred in holding that it is not entitled to the *entire* fund. While recognizing that the error can be corrected only by the Supreme Court of the United States, the Government believes that a brief contrast of this Court's decision in *United States* v. *Priest Rapids Irr. Dist.,* 175 F. 2d 524, with that of the state court will demonstrate that the latter decision should not be given any weight in the consideration of this appeal.

Thus, this Court held that in the proceedings in the federal court to condemn the privately-owned lands in the District the former owners *had* received just compensation for all their interests in the District. However, it went on to hold that, since the District had to be dissolved in the Washington courts, the ownership of its assets on liquidation was to be determined by Washington law. But the state court's decision of December 14, 1950, is not based on the law of that State. Instead that decision is that in the proceedings in the federal court to condemn the privately-owned lands the former owners *had not* been compensated for all their interests in the District and hence all the assets of the District had not been acquired by the United States in these cases! Obviously, the ground upon which the state court rested its decision was not one of Washington law. Moreover, it was one that the previous decision of this Court prohibited it from considering.

The two opinions speak for themselves.

This Court said: "In these [individual condemnation] cases, the Government asserted that it intended to acquire all of the property within the District, *as a result of which it would then become the owner of the facilities and instrumentalities of the District.*" (Fn. 8, p. 528) "No appeals were taken from the awards in the cases * * * and the lower court was without the benefit of an expression from this court as to the 'rights' of these private landowners in so-called District assets which could or might have been asserted in these cases" (p. 528); and finally (p. 533): "It is certainly clear that as to those landowners, including the District, who sold their lands outright to the Government without condemnation proceedings, there could be no legal ground of their complaining as to the price they obtained. It is only as to those individuals whose lands were condemned that any rational grievance can exist, and as to them *their cases are res judicata, and not again to be inquired into collaterally in a state court dissolution proceeding or any other kind of state court proceeding*" [Italics added.]

But in the state court dissolution proceeding the Supreme Court of Washington put its decision on the ground that (Appellees' brief, pp. 60-61): "The United States did not acquire that interest in the non-irrigation properties from any landowner whose property it acquired solely through the condemnation procedure, as the extent and value of that interest was expressly excluded from the consideration of the jury when determining what such landowners were to be paid."

Because of the foregoing and of further considerations—one of which is that the state court's decision is

based upon facts which could only be found in transcripts of evidence (if any there are) and judgments which were not before that court—it is submitted that the decision has no tendency retrospectively to support the order appealed from.[2]

Further to support the allowance made to them, appellees assert (pp. 32-36) that the judgment of affirmance in *United States* v. *Priest Rapids Irr. Dist.*, 175 F. 2d 524, and the December 14, 1950, decision of the state court establish that they have compelled the United States to pay an additional $422,252.80. But, as shown above (pp. 2-3, *supra*) appellees have no right to be paid from this fund if the United States recovers it. In the light of the fact pointed out at pp. 8-9 of the Government's opening brief that this Court's affirmance did not hold that the United States was liable to

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[2] It should be noted that each of the state courts decided the case on grounds not advanced by appellees and hence not argued to them. Thus the superior court dismissed the Government's petition on the ground that Government lands could not be subjected to District assessments (see appellees' brief, pp. 69-71). Appellees had not so contended. In the supreme court the Government attacked the trial court's reasoning. But that court avoided passing on the question by itself raising another new and unbriefed ground, namely, that in the condemnation proceedings the United States had not paid for the interest in the "non-irrigation" properties.

It must be admitted that in departing from the issues presented to them the state courts followed the practice of the federal courts in the condemnation proceedings which culminated in this Court's decision at 175 F. 2d 524. Thus, the Schwellenbach formula was evolved by the district judge *sua sponte* to the dissatisfaction of both parties. The correctness of the formula was not—and could not be—tested until the Government took its appeal from the judgment in the above-mentioned condemnation proceedings. Then—despite the fact the validity of the Schwellenbach formula was squarely presented—this Court affirmed the judgment for the reason that ownership of the assets had to be determined by Washington law. Needless to say, neither party had argued to this effect nor, so far as Government counsel recalls, had the Court by questioning suggested such a solution of the appeal.

the former landowners for any additional amount and to the further fact, just pointed out, that the state court's decision is probably wrong, it is evident that appellees are premature in claiming that the services rendered by them benefited anybody.

Accordingly, it is submitted that the order awarding appellees $55,000 of the $422,252.80 is erroneous and should be reversed.

II

The District Court Was Without Jurisdiction to Entertain the Petition for Payment of Attorneys' Fees

It is the Government's position that there must be affirmative showing of the jurisdiction of the district court to award attorneys' fees in this case. Appellees assert (Br. 20-22) that the mere fact that a court has custody of an award in condemnation gives it jurisdiction to entertain claims against those to whom the fund would otherwise belong. This assertion, unsupported by apt authority, is clearly without substance. Equally without merit is the assertion (Br. 23) that appellees have an interest in the fund by reason of unspecified "attendant facts and circumstances shown in the record." Since the facts relied on are not set forth, there is no occasion to consider whether they would generate such an interest. It is submitted therefore that appellees have failed to show that the district court had jurisdiction to entertain their petition.

III

The Amount Allowed by the District Court Should Not Be Increased

Inasmuch as any allowance of attorney fees was unauthorized, it follows that, contrary to the contention of the cross-appeal (Br. 37-53) the allowance should not be increased to $78,918.85.

CONCLUSION

For the foregoing reasons, it is submitted that the order appealed from should be reversed.

Respectfully,

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